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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KATHRYN PALMER et al.,

Plaintiffs and Appellants,

v.

EQUITABLE VARIABLE LIFE
INSURANCE COMPANY et al.,

Defendants and Respondents.

B215786

(Los Angeles County
Super. Ct. No. BC381003)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Gregory W. Alarcon, Judge. Affirmed.

S. Edmond El Dabe for Kathryn Palmer and Elizabeth A. DeGeorge, Plaintiffs and Appellants.

Rex K. DeGeorge, in pro. per., for Plaintiff and Appellant.

Gordon & Rees, Kevin W. Alexander, James M. Grady, and Lindsay J. Hulley for Defendants and Respondents.

INTRODUCTION

In this appeal from a summary judgment in favor of defendants, we must interpret the terms of a flexible premium variable life insurance policy and determine whether extracontractual representations by an agent raise a triable issue of fact to revive the plaintiffs' complaint, which is premised on these representations. Plaintiff and appellant Rex K. DeGeorge (DeGeorge) purchased a flexible premium variable life insurance policy from defendant and respondent Equitable Variable Life Insurance Company (Equitable Life). The policy contemplates annual planned periodic premium payments. Whether these periodic premiums were sufficient to continue the policy and life insurance coverage in force to the final policy date depended upon a number of factors set forth in the policy. The plaintiffs' complaint is based upon representations by DeGeorge's agent, who led DeGeorge to believe he had a policy with a set amount of premium payments, and that in 1992, when he paid \$88,000, the policy was fully paid up with no further premiums required to receive a \$1 million death benefit. As early as 1996, and at the latest January 2001, DeGeorge learned the policy was not paid up and would require further premium payments.

Upon de novo review, we conclude summary judgment was properly granted. The policy is clear and unambiguous on the obligation to pay premiums and the authority to modify the insurance contract, barring any oral agreements to the contrary. Moreover, any reliance on the agent's extracontractual representations was not justifiable. The complaint, and all the causes of action alleged therein, are based upon the misinterpretation of the policy, and fail as a matter of law.

FACTUAL BACKGROUND

A. *The Admissible Evidence*

We set out the undisputed facts supported by admissible evidence from the parties' separate statements and other unchallenged admissible evidence presented in the summary judgment motion and the opposition to the summary judgment motion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); see also *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039; Code Civ. Proc., § 437c, subd. (c).) Plaintiffs'

complaint, verified or not, cannot be used as evidence to defeat summary judgment. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720, fn. 7; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181.) Our review of the evidence, however, requires further explanation of the summary judgment procedural rules.

First, the moving parties (defendants) submitted an amended separate statement after plaintiffs responded, which is an exception to the “Golden Rule” of summary judgment, stating facts and evidence not listed in the separate statement are not considered. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 313, 315; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 251-252.) The amended separate statement contained additional facts supported by reply evidence. The opposing parties responded to the amended separate statement, but they objected to the amended separate statement and the reply evidence, citing *San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra*, 102 Cal.App.4th 308. That case rejected the inflexible Golden Rule and held the trial court has discretion to consider evidence not presented in the separate statement. (*Id.* at p. 316; see also Code Civ. Proc., § 437c, subd. (c) [“the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court”].) Since plaintiffs had an opportunity to respond and object, the trial court did not abuse its discretion in considering the reply evidence. Therefore, we also consider the reply evidence, except that to which objections have been sustained.

Second, appellants have forfeited claims of evidentiary error on appeal. Appellants sought and obtained a ruling from the trial court on their objections to declarations submitted by Ruth Shorter in support of the summary judgment motion. These objections were overruled.¹ Appellants contend that it was “error to overrule

¹ Appellants contend it was an abuse of discretion for the trial court to deny leave to amend the written objections to comply with the format of California Rules of Court, rule 3.1354(b). Any defect was overlooked when the trial court considered and overruled the oral objections. Thus, the formatting defect was not the basis of the trial court’s ruling.

them,” without addressing the specific objections, and why the trial court erred. Their failure to point to specific objections forfeits this issue on appeal. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Third, the answer to the second amended verified complaint (complaint) is not an admission of any of the facts alleged therein. Appellants advert to the law of the “negative pregnant,” to establish admissions in the answer to the complaint. A negative pregnant is an answer in a denial that is “pregnant” with an implied admission. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1068, p. 504.) The cases appellants rely on illustrate exactly why this legal theory does not apply here. (See, e.g., *Woodworth v. Knowlton* (1863) 22 Cal. 164.) In *Woodworth*, the plaintiff and livery stable keeper, let to Griffin & Atherton his horses and coach. (*Id.* at p. 167.) Knowlton, as sheriff of Nevada County, attached the coach and horses as Griffin’s property. (*Id.* at p. 168.) The complaint averred the plaintiff was the owner and entitled to the property, and Knowlton “ ‘unlawfully and wrongfully seized and took said property’ ” (*Ibid.*) The answer denied unlawfully and wrongfully seizing the property, which was not a denial that Knowlton took plaintiff’s, and not Griffin’s, property. (*Ibid.*) Thus, the answer admitted that Knowlton took the plaintiff’s property. (*Id.* at pp. 168-169.) This is the classic negative pregnant denial.

If a denial is in the exact words of a statement, as was the case in *Woodworth v. Knowlton*, *supra*, 22 Cal. at page 167, it is possible to deny the immaterial or qualifying elements, and not the material part, as a denial of the literal truth of the total statement, not its substance. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 1063, p. 499.) According to Mr. Witkin, to avoid the hazards of the negative pregnant denial, two simpler methods are acceptable: (1) denials by reference to specific paragraphs of the complaint; or (2) express admissions of certain allegations of the complaint with a general denial of those allegations not admitted. (*Ibid.*) Defendants chose the former approach; the

answer to the complaint does not constitute an admission of any material fact in this action. Nor are there any other defects in the answer that would constitute an admission.²

The complaint, however, is a judicial admission that may be used against plaintiffs as conclusive concessions of the truth. (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.) With these preliminary evidentiary matters resolved, we now turn to the facts of this case.

B. Facts Based Upon The Admissible Evidence

DeGeorge is the insured under the terms of a flexible premium variable life insurance policy number 39264429 issued on January 22, 1990 (policy) by Equitable Life. The other corporate defendants and respondents are not parties to the policy. Plaintiffs and appellants Kathryn Palmer (Palmer) and Elizabeth Anastasia DeGeorge are assignees of the policy.

1. The Provisions In The Policy

a. The Flexible Premium Payments

The policy explains the flexible premium payments. Flexible premium payments can be made at any time and in any amount, subject to certain minimum and maximum limitations. Net premiums are placed into a policy account that is a separate investment account. The value of that account, in turn, depends upon the corresponding portfolio of a designated investment company.

The first page of the policy provides in bold type: “The portion of your Policy Account that is in an investment division of our S[eparate] A[ccount] will vary up or down depending on the unit value of such investment division, which in turn depends on the investment performance of the corresponding portfolio of a designated investment company. There are no minimum guarantees as to such portion of your Policy Account.”

² We also reject the argument that the answer should be deemed an admission because it is evasive (*Verzan v. McGregor* (1863) 23 Cal. 339, 346), or because the answer is a sham, frivolous, or “bogus” (*Zenos v. Britten-Cook Land & etc. Co.* (1925) 75 Cal.App. 299, 304).

At the beginning of each policy month, an amount is deducted from the policy account to provide insurance coverage and certain monthly expenses. If the policy account does not have sufficient funds to cover the monthly deductions, the policy holder will receive notice of the amount of the premium payments sufficient to cover monthly deductions for three months.

The policy information section provides for an “initial premium payment of \$21,700.00,” “on or before delivery of the policy,” and “planned periodic premium of \$21,700.00” payable annually. This is consistent with the application for insurance.

The policy information section states: “The premium payments shown above may not be sufficient to continue the policy and life insurance coverage in force to the final policy date, which is the policy anniversary nearest the insured person’s 95th birthday. The period for which the policy and coverage will continue in force will depend on: (1) the amount, timing and frequency of the premium payments; (2) changes in the face amount of insurance and the death benefit options; (3) changes in the interest rates credited to our G[uaranteed] I[nterest] D[ivision] and in the investment performance of the investment divisions of our S[eparate] A[ccount]; (4) changes in the monthly cost of insurance deductions from the policy account for this policy and any benefits provided by riders to this policy; and (5) loan and partial net cash surrender value withdrawal activity.” This information is formatted in bold and in all capital letters, as is all the premium information contained on this page.

Effective February 8, 1992, the policy was modified following DeGeorge’s change in death benefit options. The additional policy information section states in all capitalized letters: “The planned periodic premium of \$100.00 is payable annually.” At the bottom of the page it states: “If sufficient premiums are paid, the policy provides life insurance coverage on this insured person until the final policy date You may have to pay more than the premiums shown above to keep this policy and coverage in force to that date”

The premium section of the policy does not contain any provision that it may be converted to a paid-up policy. Appellants have not cited to any section of the policy that refers to a fully paid-up policy.

b. *Death Benefit Options*

The policy has two death benefit options. Under “option A,” the death benefit is the greater of the face amount of the insurance, which is \$1 million, or a percentage of the policy account. “Option A” is a fixed amount, except when it is determined by a percentage. Under “option B,” the death benefit is the greater of the face amount of insurance plus the amount in the policy account or a percentage of the amount in the policy account. Under “option B,” the amount of the death benefit is variable.

The policy permits the insured to change the death benefit option. If the insured changes from “option A” to “option B,” the face amount of the insurance decreases by the amount in the insured’s policy account on the date the change takes effect.

c. *Loans Against Policy*

The policy also offers the insured the option to withdraw or borrow against the policy’s cash surrender value. The cash surrender value is equal to the amount in the policy account on that date minus any applicable surrender charge. The net cash surrender value is equal to the cash surrender value minus any unpaid policy loan and loan interest. Loan interest accrues daily at an adjustable rate, and it is due on each policy anniversary.

d. *Integration Clause*

The policy states: “[t]his policy, and the attached copy of the initial application and all subsequent applications to change this policy, and all additional Policy Information sections added to this policy, make up the entire contract. . . .” “Only our Chairman of the Board, our President or one of our Vice Presidents can modify this contract or waive any of our rights or requirements under it. The person making these changes must put them in writing and sign them.”

The application for insurance states: “[n]o agent or medical examiner has authority to modify this Agreement or the Temporary Insurance Agreement, nor to waive any of the Equitable Variable’s rights or requirements. . . .”

2. The Premium Payments And Loans Leading Up To Termination Notice

a. Premium Payments

From March 1990 through February 1992, DeGeorge made a total of \$43,587.83 in premium payments. On March 27, 1992, he paid \$88,000 in premium payments. In November 1995, he paid another \$128,365.13. From August 1996 through January 2001, other than the \$100 premium, neither he nor Palmer made any premium payments.

DeGeorge allocated 100 percent of the net premiums and monthly deductions to the money market investment option. He later changed his investment allocation for future premium payments and monthly deductions to 100 percent common stock.

b. Death Benefit Option

DeGeorge elected death benefit “option A” in his application, but later changed to “option B.” In 1997, Equitable Life retroactively changed the death benefit to “option B,” effective February 28, 1992. In accordance with the policy, this change decreased the face amount of life insurance to \$960,240. Upon this change, an additional policy information section became part of policy number 39264429.

c. Loans Against The Policy

DeGeorge took two loans out against the policy’s cash surrender value. In 1994, he paid back the first loan and accumulated interest. In 1996, DeGeorge obtained a second loan.

3. Witenko’s Representations And Policy Illustrations

Witenko is an Equitable Life agent who sold DeGeorge the policy. He is authorized to canvas for applications for insurance policies and annuity contracts issued by Equitable Life, and its affiliated companies. Witenko was not authorized under the policy to change its terms.

a. *Illustrations Leading Up To The Policy And Application For Insurance*

Before DeGeorge signed the application for insurance, Witenko prepared several illustrations for flexible premium variable life insurance. One illustration for a death benefit of \$500,000 showed six annualized premiums of \$9,000 but contained qualifying language: “hypothetical investment results are illustrative only and should not be deemed a representation of past or future investment results.” Two illustrations for a death benefit of \$1 million showed six annualized premiums of \$21,700 or one annualized premium of \$110,000. These illustrations contained the same disclaimer quoted above.

The illustration disclaimer is consistent with the application for insurance. Above the signature line the application states: “Under the policy applied for (exclusive of any optional benefits) the amount or duration of the death benefit may vary under specified conditions: policy values may increase or decrease in accordance with the investment experience of investment divisions in a separate account, and may increase in accordance with the investment experience of the guaranteed interest division (if the policy has a guaranteed minimum death benefit or cash surrender value it is only the amount above such minimum that may increase or decrease); and the amount payable at any endowment date is not guaranteed but is dependent on the amount in the policy account.” This disclaimer is formatted in all capitalized letters.

Similar language appears elsewhere in the application, describing the policy and asking the applicant if he understood the policy, and whether the policy is in accord with his insurance objectives. DeGeorge answered that question in the affirmative.

b. *Witenko’s 1992 Letter, Illustrations, And The 1996 Loan*

DeGeorge did not read the policy. DeGeorge’s understanding of the policy’s provisions, as represented to him by Witenko, were based upon a letter and illustrations Witenko prepared in 1992, and representations Witenko made to DeGeorge in 1996 when he obtained the second loan.³

³ The complaint refers to a 1989 Insuring Agreement that reflected the parties’ negotiations, and DeGeorge’s expectations regarding the terms of the policy. But DeGeorge’s declaration refers to the exhibits attached to the complaint, which are the

In 1992, when DeGeorge changed the death benefit, Witenko sent him two illustrations. Witenko's cover letter on Equitable Life stationery states: "I have enclosed two illustrations for your review. One of them is option A, which is the \$1,000,000 death benefit. If you wanted to have the policy paid up, it would take \$100,000 and the policy would be fully paid up for \$1,000,000 for the rest of your life." Witenko explained the second option: "On option B, as you notice for illustration purposes, under the Modified Endowment Contract rules you are able to contribute up to \$68,270 under these programs and you can make up for past years in which you did not contribute. This illustration shows that if you made those contributions for a three year period, then you will be able to pull out your cash at any given time and still have the death benefit of \$1,000,000." Both of these illustrations contain the same disclaimer previously quoted.

According to DeGeorge, Witenko's original quote of \$100,000 for option A was later revised to \$88,000. DeGeorge paid \$88,000. But DeGeorge chose option B.

In 1996, when DeGeorge obtained the second loan, he questioned Witenko's representations regarding the death benefit and policy account value. In his correspondence of August 14, DeGeorge wrote: "You led me to believe all along that my \$1,000,000 policy was all paid up. The last sum due to pay-up the policy was \$68,000 [sic] per your letter on March 5, 1992." On August 18, DeGeorge requested the maximum loan on the policy, stating in his application that the "premium is all paid."

4. Notice Of Policy Termination And Shorter's Involvement

In January 2000, plaintiffs received notice the policy was in loan foreclosure, and the policy would terminate because its net cash surrender value was insufficient due to the outstanding loan balance and nonpayment of premiums. Appellants refer to this as a "repudiation," of the contract, but they refer to the official repudiation date as January 22, 2001.

1992 letter and 1996 representations. "SAVC Exhibits 2 and 3 reflect how the policy's provisions were represented and by me [sic], and acted upon by me and EVLICO."

DeGeorge and Palmer contacted Shorter, now vice president of AXA Equitable Life Insurance Company, upon receiving the notice of policy termination. Shorter is responsible for reviewing and responding to customer inquiries and complaints regarding various insurance policies issued by the company. As part of her official duties, Shorter addressed questions from DeGeorge and Palmer about the policy.

After receiving the notice, DeGeorge received two illustrations from Witenko, both requiring additional premium payments. In 2004, the second loan was repaid. Palmer has continued to make premium payments “under protest.”

5. Role Of Various Corporate Entities

Equitable Life issued the policy, but the complaint asserts causes of action against several other corporate entities. Only three of these corporate entities remain viable: AXA Financial, Inc., AXA Equitable Life Insurance Company, and AXA Advisers, LLC. The latter two corporate entities are indirect subsidiaries of AXA Financial, Inc.⁴

PROCEDURAL BACKGROUND

In November 2007, plaintiffs filed their complaint. The crux of the complaint is that the policy was “paid up,” after DeGeorge’s \$88,000 payment, and the policy account should have had about \$700,000 according to the insured’s calculations (attached as an exhibit to the complaint) at the time of the repudiation of the policy, which is alleged to have been February 8, 2000, or based on DeGeorge’s declaration, January 22, 2001. The complaint alleges 15 causes of action against Equitable Life and the corporate entities. These causes of action include: (1) concealment and misrepresentation; (2) promissory estoppel; (3) violation of fiduciary duties; (4) breach of trust; (5) specific performance; (6) breach of the covenant of good faith and fair dealing; (7) negligent management by trustee; (8) negligent and reckless misrepresentation and concealment; (9) breach of contract; (10) accounting; (11) injunction; (12) reformation; (13) professional reckless negligence; (14) rescission, waiver, modification, novation (Civ. Code, § 1698); and (15) interference with prospective advantageous relations [*sic*]. Several of these causes

⁴ Although there appears to be some discrepancy in the record, we rely on Shorter’s undisputed declaration describing the corporate relationship.

of action also are alleged against Shorter.⁵ The sixteenth cause of action, alleging a conspiracy and naming Witenko, was previously dismissed. The court also previously struck from the complaint alter ego and agency allegations.

Defendants moved for summary judgment on the grounds that the policy contained an integration clause barring any contrary oral agreements. As noted, in reply and in response to plaintiffs' separate statement, defendants presented additional evidence that Witenko had no authority to change the insurance contract.

Alternatively, several defendants moved for summary adjudication. Shorter moved on the grounds that the causes of action alleged against her were barred because they arose from her employment. The Equitable Life Assurance Society of the United States, Equitable Companies Incorporated, and EQ Financial Consultants moved on the grounds that these entities were no longer viable corporate entities. AXA Financial Inc. and AXA Advisers, LLC moved on the grounds that neither one was a party to the policy and had no involvement with its maintenance or operation.

The trial court granted the summary judgment motion in favor of Equitable Life, AXA Financial Inc., and AXA Advisers, LLC, concluding that any prior oral contract was extinguished when the policy was issued. Moreover, in accordance with the policy, any modifications had to be in writing.

The trial court granted summary adjudication in favor of Shorter and the former corporate entities. Judgment was entered on April 9, 2009, and notice of entry of judgment was served on April 15, 2009. Plaintiffs timely filed a notice of appeal. During the pendency of the appeal, the judgment was amended to include costs.

⁵ Plaintiffs allege the following causes of action against Shorter: concealment and misrepresentation; violation of fiduciary duties; breach of trust; negligent management by trustee; negligent and reckless misrepresentation and concealment; accounting; injunction; professional reckless negligence; and interference with prospective advantageous relations [*sic*].

DISCUSSION

Appellants challenge the propriety of the summary judgment motion.⁶ As with any appeal, on appeal from a summary judgment, appellants must point out the triable issues they claim are present by citation to the record and any supporting authority. Review is limited to issues that have been adequately raised and briefed. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.)

A. Standard of Review

We independently review the judgment to determine if a triable issue of fact exists. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851; see also *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 388-389.) We use the same three-step analysis used by the trial court, which begins with identifying the issues framed by the pleadings. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) Next, we determine whether the moving party has made a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar, supra*, at pp. 850-851.) Finally, if the moving party has carried its initial burden, we decide whether the opposing party has made a prima facie showing of the existence of a triable issue of material fact. (*Ibid.*) “A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]” (*Id.* at p. 851.) Although the burden of production shifts, the moving party always bears the burden of persuasion. (*Ibid.*) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850, fn. omitted.)

Applying these principles, we uphold the trial court’s summary judgment ruling.

⁶ Appellants present no argument to reverse the motion for summary adjudication in favor of Shorter and the former corporate entities, and have therefore forfeited those issues on appeal. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177.)

B. *Interpretation Of The Policy*

Despite allegations of an oral contract before entering into the policy, the crux of the complaint (and evidence presented to oppose the summary judgment) is that DeGeorge was misled by Witenko's 1992 letter and illustrations that the policy would be fully paid up with the \$88,000 premium payment. We begin with the policy and a determination as to whether there was an ambiguity in the policy.

Ordinary rules of contract interpretation apply to insurance policies. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390; *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204, citing *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) Under statutory rules of contract interpretation, our goal is to give effect to the mutual intention of the parties, and, where possible, to infer this intent from the written provisions in the policy. (Civ. Code, § 1636; *Haynes, supra*, at p. 1204.) When interpreting a policy provision, we give its words the ordinary and popular meaning except when used by the parties in a technical or other special sense. (Civ. Code, § 1644; *Haynes, supra*, at p. 1204.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (Civ. Code, § 1638.) Although each term must be read in its "ordinary and popular sense," the term must be interpreted in context and with regard to its intended function and the structure of the policy as a whole. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) In addition to considering disputed policy language in the context of the policy as a whole, we consider "the circumstances of the case in which the claim arises and 'common sense.'" [Citation.] (*Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103, 1112.) Parol evidence may be admissible to determine whether the terms of a contract are ambiguous, but it is not admissible if it contradicts a clear and explicit policy provision. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 73.)

"Policy language is ambiguous if it is susceptible of more than one reasonable interpretation in the context of the policy as a whole. [Citation.] Whether policy language is ambiguous is a question of law that we review de novo. [Citations.] Any

ambiguity must be resolved in a manner consistent with the objectively reasonable expectations of the insured in light of the nature and kind of risks covered by the policy. [Citation.]” (*State Farm General Ins. Co. v. Mintarsih* (2009) 175 Cal.App.4th 274, 283.) Moreover, any provision that limits coverage reasonably expected by the insured under the policy terms must be conspicuous, plain, and clear to be effective. (*Haynes v. Farmers Ins. Exchange, supra*, 32 Cal.4th at p. 1204.) Whether a policy limitation is conspicuous, plain, and clear also is a legal question. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18; *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 453.) There is no ambiguity in the explanation of the premium payments in the policy or in the integration clause.

1. *The Insurance Contract Is A Flexible Premium Variable Life Policy*

By the terms of the policy, any prior oral agreement merged into the policy. The policy explicitly states the policy, the initial application, and all additional policy information sections added to the policy make up the entire contract. This language is clear and unambiguous. Based upon this plain meaning, no oral representation before the policy was issued could have been effective to change the terms of the fully integrated policy. (See *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 662-663 [oral representations not effective to change terms of fully integrated policy]; *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1435-1436 [business plan that predated integrated written agreement could not contradict fully integrated written agreement].) The terms DeGeorge claims were or should have been in the policy are contrary to the policy and application of insurance.

The policy states clearly and repeatedly that it is a “flexible premium variable life insurance policy.” The policy information section sets forth the initial premium payment, and the annual, planned periodic premium payment of \$21,700. The disclaimer at the bottom of that page states these premiums may not be sufficient to continue the policy and life insurance coverage in force to the final policy date. The period for which the policy and coverage continues depends upon, among other things, “the timing and frequency of premium payments” and “loan and partial net cash surrender value

withdrawal activity.” This information also appears in the additional policy information section reflecting the planned period premium of \$100. This language is clear and unambiguous.

Appellants contend there is a purported ambiguity in the face page of the policy. The face page of the policy states in bold type: “The amount of the death benefit, or the duration of insurance coverage, or both, may be variable or fixed as described on Pages 6 and 8.” Page 6 of the policy describes the death benefit options. Page 8 contains an oversize-type heading: “The Premiums You Pay.” The text describes other premium payments, limits on premium payments, grace periods, and reinstatements if the policy has ended without value. Nowhere in either of these policy provisions is there any reference to a fixed-premium or fully paid-up policy.

We do not read “fixed” and “variable” on the face page as ambiguous. These terms refer to the amount of death benefit or insurance coverage. There is no common sense or contextual reading of the policy that would turn either one of these terms into the term “fully paid-up policy,” especially when the internal references explain the meaning of the fixed or variable death benefits.

Appellants also appear to contend the illustration of a \$110,000 premium payment Witenko prepared leading up to the application for insurance creates an ambiguity in the policy. Appellants have included this illustration as part of the contract. This is parol evidence because the policy does not include this illustration, nor does it reflect the premiums as stated in the policy. Nevertheless, this illustration does not state it is a fixed premium or that the policy will be fully paid up with one premium payment. Rather, the illustration refers to a “1st year planned annual premium” for a flexible premium variable life insurance policy with a death benefit of \$1 million, the face amount of insurance. Moreover, this illustration contains the previously quoted disclaimer, which states the illustration was hypothetical and was dependent upon investment returns and other variables. The illustration would not lead a reasonable person to conclude a flexible premium variable life insurance policy would be fully paid up with a one-time premium payment. Especially when the policy DeGeorge actually bought stated a different

annualized, planned premium of \$21,700. Thus, to the extent DeGeorge's understanding of the policy is contrary to its explicit language, his subjective intent is not relevant. (Civ. Code, §§ 1636, 1640; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265; 1 Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶ 4:13, p. 4-4.)

2. *The Policy Is Not Ambiguous On The Right To Make Policy Changes*

Appellants next contend Witenko's 1992 letter and accompanying illustrations converted the policy to a fully paid-up policy, which was permitted under the insurance contract arising from two ambiguous provisions that address policy changes. We disagree. The insurance contract is clear and unambiguous; Witenko had no authority to change the policy terms.

An agent does not have authority to orally modify the policy, which is part of the insurance contract. Only the chairman of the board, president, or a vice president has the authority to modify the contract. Any modifications must be in writing.

We do not find any ambiguity between this limit of authority and the policy holder's right to make policy changes. The policy provides that the insured may "change this policy to another available plan of insurance or add additional benefit riders or make other changes, subject to our rules at the time of change." The right to make "other changes," for example, refers to the policy holder's right to change death benefits. This provision does not permit the policy holder to rewrite the insurance contract. Moreover, appellants' construction of these two provisions is absurd because a policy holder's "subsequent applications to change this policy" is part of the definition of the insurance contract.

We also reject appellants' contention that an ambiguity arises from the language in the integration clause, which refers to the policy holder's rights under federal and state laws and regulations. This reference does not confer any rights to rewrite the insurance contract. To adopt appellants' construction would render the description of the insurance contract meaningless and would violate the rule that we must read the contract as a whole

“to give effect to every part . . . each clause helping to interpret the other.” (Civ. Code, § 1641.)

3. *The \$88,000 Check And Subsequent Loan Was Not An Endorsement*

Appellants alternatively contend if the policy was not initially written as a fully paid-up policy, and could not be converted to one, then the payment to Witenko of the \$88,000 premium was an endorsement. An endorsement is an amendment to or modification of an existing insurance policy. (*Adams v. Explorer Ins. Co.* (2003) 107 Cal.App.4th 438, 450-451.) An endorsement may alter or vary any term or condition of the policy. (*Id.* at p. 450.) But, under the terms of the policy, the endorsement must be in writing. The record contains no policy information section issued in 1992 that reflects this endorsement.

Appellants’ position is the policy was modified by conduct arising from the 1996 loan, and the subsequent \$100 annual premium payments. We disagree. DeGeorge’s application for a loan with a handwritten notation stating his subjective belief that “the premium is all paid,” did not alter the terms of the policy. Moreover, the \$100 annual premium payment specifically stated the policy holder might have to pay additional premiums to keep the policy and coverage in force to the final policy date.

4. *The Policy Provisions Were Conspicuous, Plain, And Clear*

Admitting DeGeorge did not read the policy, appellants argue these provisions were insufficiently clear and conspicuous so as to be unenforceable. The court in *Haynes* said “Coverage may be limited by a valid endorsement But to be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be ‘conspicuous, plain and clear.’ [Citation.]” (*Haynes v. Farmers Ins. Exchange, supra*, 32 Cal.4th at p. 1204.) *Haynes* explained endorsements or other limitations that were deemed inconspicuous reduced coverage and were surrounded by unrelated language or were otherwise buried in the policy. (*Id.* at pp. 1205-1206.) In this case, the policy provisions do not reduce coverage but describe the flexible premium variable life policy. The description of the premium payments and the type of policy DeGeorge obtained were

both clearly and unambiguously set forth throughout the policy, and in the application for insurance.

C. No Extracontractual Liability Arising From Witenko's Representations

Appellants contend DeGeorge could justifiably rely on Witenko, even though his representations were contrary to the policy terms. We discuss these contentions in light of the unambiguous policy provisions and agency principles.

1. The Effect Of The Integration Clause And Unambiguous Policy Terms

As noted, the policy contains an unambiguous integration clause, which the trial court and respondents claim is dispositive. The integration clause merged all prior oral agreements, and limits authority to modify the contract.

When a policy contains an integration clause, some courts hold that no oral representation that contradicts the terms of the policy is effective. (*Everett v. State Farm General Ins. Co.*, *supra*, 162 Cal.App.4th at pp. 662-663.) This is so regardless of whether the oral representation predates the integrated agreement (*Alling v. Universal Manufacturing Corp.*, *supra*, 5 Cal.App.4th at pp. 1435-1436) or is a modification or change to the terms of a fully integrated policy (*Everett, supra*, at pp. 662-663).

As a matter of law, we agree that DeGeorge's reliance on illustrations that pre-date the policy was not justifiable based upon the fully integrated agreement and the conspicuous and unambiguous terms of the policy.⁷ An " 'insured has a duty to read his policy' " and the general rule is " 'a party is bound by contract provisions and cannot complain of unfamiliarity' " with them. (See *Haynes v. Farmers Ins. Exchange, supra*, 32 Cal.4th at p. 1210.) As previously noted, this case does not present the issue in *Haynes*, that is, hidden and unfair limiting language in the insurance policy that has not

⁷ The complaint alleges defendants breached the terms of the oral insurance policy, entitled the "Life Insuring Agreement of November 29, 1989." The complaint further alleges: "To the extent the Policy memorandum [policy] differs with the Insuring Agreement of 1989, it is a mere instrument of fraud and of defendants' device, scheme and artifice." As noted, in opposition to summary judgment, however, plaintiffs stated their complaint is based upon the 1992 representations and subsequent events.

been brought to the attention of the insured and explained to the subscriber of a loss of benefit. (*Id.* at pp. 1210-1211.)

There is, however, undisputed evidence of Witenko's subsequent representations after the policy issued. Although Witenko had no authority to change or modify the policy, we must consider whether there is any evidence to raise a triable issue that Witenko had extracontractual authority.

2. *Scope Of Witenko's Actual Authority Does Not Include Writing Or Modifying Insurance Contracts*

The Civil Code defines an agent as one who represents the principal in dealings with third persons. (Civ. Code, § 2295.) A principal can limit an agent's authority. (Civ. Code, § 2318; *Toth v. Metropolitan Life Ins. Co.* (1932) 123 Cal.App. 185, 192.)

It is undisputed that Witenko was an agent for Equitable Life. It is also undisputed that the scope of his agency was limited. Witenko was an Equitable Life agent authorized to solicit insurance and to write applications for insurance. "A mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts, but not to consummate them, and cannot bind his principal by anything he may say or do during the preliminary negotiations. [Citations.]" (*Toth v. Metropolitan Life Ins. Co.*, *supra*, 123 Cal.App. at p. 192.) The undisputed evidence shows that Witenko had no authority to enter into any contract of insurance, either oral or written.

Moreover, appellants were on notice of Witenko's limited authority. The application DeGeorge signed limits Witenko's authority. The policy also limits the authority to modify the contract. These express terms, along with the undisputed evidence of Witenko's limited authority, defeat as a matter of law any claim that DeGeorge's reliance on Witenko's representations was justified.

3. *No Evidence Of Ostensible Authority Arising From Equitable Life's Conduct*

Appellants contend, however, that even if Witenko did not have authority to modify the contract, Equitable Life is estopped from repudiating the "1992 modification" of the policy because Witenko was their agent when he allegedly misled DeGeorge. This

is essentially a question of ostensible agency. “Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.” (Civ. Code, § 2317.) While actual authority is based upon what the principal leads the agent to believe, ostensible authority is based on what the principal leads the third person to believe. Ostensible authority is based upon acts or declarations of the principal, and not the conduct of the agent. (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761.) Liability of the principal for the ostensible agent requires not only the principal’s conduct, but also “justifiable reliance by a third party, and a change of position from such reliance resulting in injury. [Citation.]” (*Ibid.*)

Appellants point to indicia of agency that Witenko represented Equitable Life, but there is no evidence to even suggest that Equitable Life led appellants to believe Witenko could write or modify insurance contracts. Neither accepting the \$88,000 premium nor approving the second loan on the policy creates a triable issue of fact on ostensible agency or ratification of extracontractual promises. Both acts were consistent with the terms of the policy.

4. *Cases Imposing Liability On Principal For Agent’s Misrepresentation Are Inapposite*

Appellants cite numerous California cases and a Third Circuit case decided under Pennsylvania law, *Tran v. Metropolitan Life Ins. Co.* (3d Cir. 2005) 408 F.3d 130, 132-134, 136-137, which they principally rely on for the proposition that an insurer is liable for its agents’ misrepresentation of policy terms. *Tran* involves an agents’ misrepresentation regarding policy terms at the time the policy was issued.

(*Tran v. Metropolitan Life Ins. Co.*, *supra*, 408 F.3d at pp. 132-133, 138.) The California cases address an agent’s failure to obtain the requested coverage. (See *Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 811 [sufficient evidence to support the judgment for fraud based upon the agent’s representations that the insured had the coverage he wanted]; *Valdez v. Taylor Automobile Co.* (1954) 129 Cal.App.2d 810, 816-817 [sufficient evidence to support the jury verdict that a car purchaser

justifiably relied on the car salesman's oral representations that he would have "full insurance coverage," which included coverage for bodily injury and property damage[.]

This case is distinguishable because the policy terms are clear and unambiguous. Appellants contend the policy was converted, modified, or ratified to become a fully-paid up policy. Appellants, therefore, are in a different position than the plaintiffs in *Tran*, *Greenfield*, or *Valdez*, and cannot say they relied on representations and later discovered the policy was a different one than the one DeGeorge purchased. Under these circumstances, DeGeorge cannot show justifiable reliance.

D. Summary Judgment Was Properly Granted

Based on our interpretation of the insurance contract, we have concluded the contract claims and claims arising from Witenko's representations were properly adjudicated. The remaining causes of action were based upon appellants' misinterpretation of the policy, and also were properly adjudicated.

1. *Contract-Based Claims: Specific Performance (Fifth), Breach Of The Implied Covenant Of Good Faith And Fair Dealing (Sixth), Breach Of Contract (Ninth), Reformation (Twelfth), And Rescission, Waiver, Modification, Novation (Fourteenth)*

These causes of action are based upon the oral agreements that purportedly pre-date the policy and the 1992 letter and illustrations presented after the policy issued. As we have previously stated, the contract of insurance contained an unambiguous integration clause, and there is no evidence to raise a triable issue of fact that Witenko had authority to modify the contract. Moreover, because there is no written contract memorializing these terms, there can be no breach of the implied covenant of good faith and fair dealing. (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 36.)

2. *Causes Of Action Arising From Agent's Representations: Misrepresentation And Concealment (First), Promissory Estoppel (Second), Negligent Misrepresentation (Eighth)*

These causes of action are based upon Witenko's alleged representations (not concealments) in connection with the sale of the policy and the policy terms, Witenko's

representations in the 1992 letter and illustrations, and Witenko's representations in 1996. Based upon the clear and unambiguous terms of the policy, any reliance on these representations was not justifiable or reasonable, which is an essential element of each of these causes of action. (*Khan v. Shiley, Inc.* (1990) 217 Cal.App.3d 848, 857-858 [misrepresentation]; *Helmer v. Bingham Toyota Isuzu* (2005) 129 Cal.App.4th 1121, 1129, fn. 3 [promissory estoppel]; *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184 [negligent misrepresentation].) We may determine reliance as a matter of law, where, as here, the facts permit reasonable minds to come to just one conclusion. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

3. *Remaining Causes Of Action Are Based Upon The Policy*

The remaining causes of action for breach of fiduciary duty (third cause of action), breach of trust (fourth cause of action), negligent management of trust (seventh cause of action), accounting (tenth cause of action), professional negligence (thirteenth cause of action), and interference with prospective economic advantage are based upon appellants' misinterpretation of the policy, and fail as a matter of law. Since appellants have presented no evidence to raise a triable issue of fact on their tort or contract causes of action, their claim for injunctive relief (eleventh cause of action) also fails as a matter of law. (*City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293.)

DISPOSITION

The judgment is affirmed. Appellants are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.